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In the Supreme Court of the United States

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No. 607.

OCTOBER TERM, 1969.

THE DAILY PRESS, INC.,
Petitioner,

vs.

UNITED PRESS INTERNATIONAL,
THE EVENING NEWS ASSOCIATION
and
KNIGHT NEWSPAPERS, INCORPORATED,
Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

BRIEF OF RESPONDENT UNITED PRESS INTERNATIONAL IN OPPOSITION

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BRIEF OF RESPONDENT UNITED PRESS INTERNATIONAL IN OPPOSITION

Respondent United Press International ("UPI") opposes the granting of certiorari. No novel or important procedural or substantive questions are presented. The decision below is not in conflict with the decisions of this Court and is clearly correct.

QUESTION PRESENTED

Under the decisions of this Court did the Court of Appeals properly affirm the summary judgment granted in favor of respondent United Press International when, after exhaustive discovery:

(a) Petitioner, an interim or "strike" newspaper, which admittedly was not a competitor or potential competitor of respondents, failed to produce any significant probative evidence to support petitioner's antitrust claims and no genuine issue of fact remained for trial?

(b) The undisputed evidence affirmatively disproved petitioner's claim that respondents contracted, combined and conspired to deprive petitioner's interim newspaper of UPI's news service during the 1964 Detroit newspaper strike in violation of Section 1 of the Sherman Act?

(c) Petitioner failed to produce any evidence of the alleged attempt to monopolize or monopolization by respondent UPI alone or in concert with the newspaper respondents in violation of Section 2 of the Sherman Act?

STATEMENT OF THE CASE

Because of numerous inaccuracies and omissions in petitioner's Statement of the Case (Pet. Cert. 4-11), respondent UPI presents the following restatement of the material facts.[1]

This action for treble damages for alleged violations of Sections 1 and 2 of the Sherman Act, 15 U.S.C. §§ 1 and 2, arises out of the 1964 Detroit newspaper strike. The respondents are UPI, Knight Newspapers, Inc., which publishes *The Detroit Free Press* (the "Free Press"), a Detroit morning daily newspaper, and The Evening News Association, which publishes *The Detroit News* (the "News"), a Detroit evening daily newspaper.

This case presents a simple factual situation: From July 13, 1964, until November 24, 1964, the Free Press and the News were closed by a labor strike and were not published (7a-8a).[2] Petitioner was organized on July 20, 1964, for the purpose of publishing a daily newspaper known as *The Detroit Daily Press* (the "Daily Press")

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[1] A complete statement of facts is set forth in the opinions of the court below (Pet. Cert. 23-65).

[2] References to "(a)" are to pages in the Joint Appendix in the Court of Appeals. References to "(b)" are to pages in the Exhibit Volume in the Court of Appeals.

so long as the respondent newspapers were closed by the labor strike (228a, 308a, 26b, 27b). Indeed, the Daily Press was largely staffed by the employees of the respondent newspapers idled by the strike (116a, 124a, 269a-271a). The Daily Press ceased publication, as intended, on November 22, 1964, when the Free Press and News employees on its staff returned to their regular employment with the respondent newspapers to enable them to resume publication (6a, 21a). The Free Press and News resumed publication on November 24, 1964. During the strike the Daily Press was the only daily newspaper of general circulation published in Detroit (6a).

The Daily Press admittedly was an "interim newspaper" which was to be (and actually was) discontinued upon termination of the strike. Petitioner's principals had no intention to publish beyond the strike settlement.[3] At all times petitioner indicated to UPI that petitioner was going "to publish as long as the strike lasted and * * * would cease publishing when the strike ended" (228a). Contrary to petitioner's present assertion (Pet. Cert. 11), it "* * * had no real plan" for a permanent publication, "this was just an idea" (365a-367a).

During its short, always uncertain, period of publication, petitioner unsuccessfully attempted to obtain UPI's wire services for the indeterminate duration of the newspaper strike which had closed the respondent newspapers. UPI refused to service petitioner on an interim

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[3] A letter from General Features Corporation to Mr. Dworkin, Editor and Publisher of the Daily Press, in connection with its purchase of certain features states: "It is my understanding from our conversation that The Detroit Daily Press is an interim paper and that you will cease publication when the city has its other newspapers back in operation" (27b). Petitioner's counsel admitted that the deposition testimony of petitioner's principals left "no doubt" that this was an interim venture. *Transcript of Proceedings on Objections to Interrogatories* (District Court, February 6, 1967) at 6 (hereinafter "*Transcript*").

basis (22b).[4] In short, UPI's alleged "refusal to deal" was a *refusal to sell on petitioner's terms* (185a, 190a, 63a-64a, 90a, 206a, 218a-219a, 286a, 307a, 356a, 361a-362a).

Petitioner's complaint alleges that, *beginning in July 1964*, and continuing up to and including the date of the filing of the complaint, respondents combined, contracted and conspired to prevent petitioner from obtaining all or any of the UPI wire services in violation of Section 1 of the Sherman Act; that UPI, acting alone, refused to deal with petitioner as part of an unlawful attempt to monopolize and monopolization of commerce in violation of Section 2 of the Sherman Act; and that the three respondents individually and jointly attempted to monopolize and did in fact monopolize trade and commerce in violation of Section 2 by virtue of conduct calculated to prevent petitioner from purchasing all or any wire services from UPI (5a-15a). Petitioner charged that respondents by such alleged *conduct* "* * * prevented and suppressed actual and potential competition between plaintiff and the Evening News and Knight * * *." (13a) Respondents filed separate answers which denied all the substantive allegations of the complaint.

Within thirty days after suit was filed, exhaustive discovery was begun. All parties produced masses of documents pursuant to motions. Every document, relevant or irrelevant, was examined, including thousands of UPI's telephone stubs. Every witness and principal of the four parties having any knowledge of the facts was deposed.

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[4] At least seven other wire service companies declined to service petitioner on an open-ended basis (243a-247a, 310a). Because of its fleeting existence petitioner made no effort to obtain Associated Press, the largest wire service in the world, or confirm its "belief" that such effort would involve "undue delay." (234a-237a, 310a). Petitioner did obtain services from other sources and told UPI in August, 1964, that it was "getting along fine" and did not need UPI's services after all (366a).

All of petitioner's directors, incorporators, original stockholders, officers and key employees testified at length on deposition, and petitioner deposed all of respondents' key personnel. All the depositions desired by the parties were completed and totaled over 1,000 pages of testimony.

After all depositions had been completed, petitioner served separate sets of interrogatories on all of the respondents on April 1, 1966. On April 18, 1966, at a second pretrial conference held before District Judge Smith, partly to consider the interrogatories (3a), respondents stated they would file motions for summary judgment. Because of this statement, the District Court suggested that petitioner review its interrogatories in the light of the issues which would be raised by the summary judgment motions.[5]

Beginning on June 1, 1966, respondents filed separate motions for summary judgment (51a, 143a and 148a). On February 6, 1967, seven months subsequent to the filing of the motions for summary judgment, a hearing was held at which the District Court ruled on the interrogatories and found that half of them were improper and the balance were questionable. *Transcript* at 26. As to those interrogatories which were questionable, the District Court *again* suggested that petitioner might wish to "reframe" those which petitioner thought would be of "substantial" use to it in resisting the motions for summary judgment. *Transcript* at 26-27.[6] At no time did petitioner attempt to reframe its interrogatories.

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[5] Petitioner's counsel agrees that this suggestion was made by the District Court at the unreported pretrial of April 18, 1966. (Appellant's Brief, Court of Appeals, at 3)

[6] That petitioner's counsel deemed further discovery unnecessary appears clear from his statement to the court on February 6, 1967: "We feel, *based upon the discovery to date*, that there is very definitely a violation of the Sherman Act made out * * *." (*Transcript* at 14.)

Petitioner still had substantial time within which to act respecting the interrogatories and the summary judgment motions. Petitioner made no attempt to reframe the interrogatories and took no other action regarding the form of such questionable interrogatories, although almost eleven additional months elapsed before the District Court entered summary judgment on March 27, 1968. Thus, *petitioner had within three days of two full years after the filing of its interrogatories and approximately 21 months after the filing of the motions for summary judgment in which to reframe its interrogatories or pursue further discovery and did nothing.* Obviously these events do not support petitioner's present claim that the court "refused to permit plaintiff to complete discovery of relevant information from defendants." (Pet. Cert. 3.)

On March 27, 1968, District Judge Talbot Smith entered his opinion and order granting respondents' motions for summary judgment (169a-194a).

Upon a full hearing, the Court of Appeals affirmed the District Court. Chief Judge Weick, writing for a unanimous panel, noted that the case was not complex (Pet. Cert. 52), and held:

> "Plaintiff did not claim that there was any direct proof of any agreement, combination or arrangement on the part of the defendants to deprive plaintiff of wire services; neither do we find any circumstantial evidence from which inferences could properly be drawn, even tending to establish an agreement. In their depositions the knowledgeable officers and employees of plaintiff were interrogated on this subject, and none of them knew of any activities of defendants which were directed at preventing plaintiff from obtaining wire services. On the contrary, the sworn testimony of Harvey W. Patton and Peter B. Clark of the News, and of Lee Hills of the Free Press, was clear that they did nothing to interfere with plain-

tiff's acquisition of wire servce from UPI. Lee Hills went even further. He tried to help plaintiff obtain such service. There was no proof of any discussion between the News and the Free Press concerning UPI's furnishing wire service to plaintiff.

"The District Court properly characterized plaintiff's proof as follows:

> "'[P]laintiff's case is supported by inference drawn from inference based upon inference, supported by facts which are in themselves mere conclusions, and inferences drawn from other facts.'" (Pet. Cert. 60.)

REASONS FOR DENYING THE WRIT

I. The Decision Below Is Not in Conflict With the Decisions of This Court.

Petitioner challenges UPI's refusal to provide wire services on an interim basis according to terms proposed by petitioner as either the result of an unlawful "contract, combination or conspiracy" among the respondents or as the monopolistic act of UPI alone.[7] The court below found that there was no evidence to support these allegations. No novel or important procedural or substantive questions are presented and the decision below does not conflict with the decisions of this Court.

The facts and issues of this case are simple and the *material* facts uncontroverted. Petitioner desired UPI wire services on a short term basis of uncertain duration for its interim publishing venture during a newspaper strike in Detroit. UPI insisted on a longer term commit-

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[7] Having failed to adduce any proof probative of its antitrust allegations, petitioner now also emphasizes the "policy favoring private anti-trust suits" and the theme of the First Amendment in favor of the "widest possible dissemination of information" (Pet. Cert. 12), Neither can supply the missing elements of petitioner's antitrust case.

ment. Neither of the newspaper respondents opposed, and one affirmatively facilitated, petitioner's request for UPI service. No competition, actual or potential, existed between UPI or the newspaper respondents and petitioner.[8]

Petitioner's antitrust allegations depend upon its claim that competition between it and the newspaper respondents "has been prevented or suppressed."[9] In fact, petitioner's transitory existence depended entirely upon the *absence of competition* between it and the newspaper respondents. As the record shows and the Court of Appeals observed:

> "The difficulty with Plaintiff's case is the Plaintiff intended to fill the void created by the strike. It did not know how long the strike would last, whether one or two days or a few months. When the strike was over it would lose its employees (who intended to and did return to their jobs with the News and Free Press) and Plaintiff would fold, as it did. In this precarious situation Plaintiff could make only short term commitments." (Pet. Cert. 52.)
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> * * * * *
>
> "*Plaintiff was never a competitor of the two struck newspapers, or of UPI.* During the strike the News

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[8] At no time during the negotiations for UPI service did petitioner seek such service for any continuing publishing venture, nor did it reveal any facts to UPI which would in any way support an intention to continue in business in any location beyond the duration of the strike (365a-367a). Whatever its actual intentions were, it dealt with UPI as an interim publishing venture only. See p. 3 *supra*.

[9] In its complaint, petitioner particularizes the claimed effect of respondents' unlawful conduct as follows:

> "More particularly, defendants have prevented and suppressed actual and potential competition between plaintiff and the Evening News and Knight, have denied plaintiff services essential to its present and future success in the newspaper business, have deprived the public of an important source of news, and have denied advertisers the benefits of actual and potential competition between plaintiff and Evening News and Knight." (13a)

and Free Press did not publish, and Plaintiff had a virtual monopoly of the newspaper market in Detroit, and made the most of it." (Pet. Cert. 61.) (Emphasis added.)

This central fact underscores the entire lack of substance and want of plausibility in petitioner's case.

By contrast, in *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), respondent CBS had withdrawn its network facilities from petitioner and had transferred them to its own station which was engaged *in direct competition* with petitioner.

As the court below observed,

> "[In *Poller*,] the competitive relationship between the parties was such as to make plausible the Plaintiff's argument that the defendant had embarked on a plan designed to put him out of business. In the present case it would be preposterous to make any such claim." (Pet. Cert. 50.)

Poller stands simply for the proposition that summary judgment is inappropriate where there is substantial factual evidence tending to show the existence of a conspiracy *to eliminate a competitor*, and the crucial question is motive.[10]

Nothing in *Fortner Enterprises, Inc. v. U. S. Steel Corp.*, 394 U.S. 495 (1969) and *Norfolk Monument Co., Inc. v. Woodlawn Memorial Gardens Inc.*, 394 U.S. 700 (1969) challenges the applicability of Rule 56(c) to antitrust cases or contradicts this Court's application of the

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[10] As this Court observed in *White Motor Co. v. United States*, 372 U.S. 253, 259 (1963), "Summary judgments have a place in the antitrust field, as elsewhere." Under the Rule, FED. R. CIV. P. 56(e), petitioner is required to produce evidence outside the pleadings and cannot resist summary judgment on the basis of conclusions based exclusively on the allegations of its own complaint.

Rule in *First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968). In that case this Court said:

> "* * * While we recognize the importance of preserving litigants' rights to a trial on their claims, we are not prepared to extend those rights to the point of requiring that anyone who files an antitrust complaint setting forth a valid cause of action be entitled to a full-dress trial notwithstanding the absence of any significant probative evidence tending to support the complaint." *Id.* at 290

In *Fortner*, while the courts below had found a tying agreement, they had misapplied the standards established by this Court for determining illegality. *Fortner* is wholly inapposite here. As this Court there reiterated,

> "'"tying agreements serve hardly any purpose beyond the *suppression of competition.*" * * * They deny competitors free access to the market for the tied product, not because the party imposing the tying requirements has a better product or a lower price but because of his power or leverage in another market.'" 394 U.S. at 498-99 (Emphasis added.)

In the tie-in context, this Court concluded that

> "petitioner [had] raised questions of fact which, if proved at trial, would bring this tying arrangement within the scope of the *per se* doctrine." *Id.* at 501

In *Norfolk Monument, supra*, four *competing* cemetery operators and a manufacturer of bronze grave markers *resold by the operators in competition with petitioner* were charged with

> "having jointly adopted various restrictive devices to prevent, restrict and discourage sales of markers by the petitioner." 394 U.S. at 701

Evidence of parallel *conduct* by the respondents, including the adoption of almost identical restrictive "regulations" suggested by the manufacturer, raised inferences of anti-

competitive motive not fully rebutted by discovery evidence. Nothing in *Albrecht v. Herald Co.*, 390 U.S. 145 (1968), also relied upon by petitioner, does away with the necessity for proof of *concerted action or conduct* resulting in an unreasonable restraint of trade.

Unlike *Poller, Norfolk Monument* and *Albrecht,* in this case none of the respondents had any competitive relationship to petitioner, and there is no proof of parallel or any other conduct raising an inference of anti-competitive motive or design. Petitioner cannot suggest, let alone prove, any plausible rationale for conspiracy or combination "to eliminate or suppress" strike-bound competition in Detroit, or how the *refusal* of UPI to sell its services on an interim basis to petitioner could create or enhance a "monopoly" position in the market for news wire services and thereby "eliminate or suppress" newspaper competition in Detroit.

Under these facts, the "reasonableness" of UPI's refusal to accept petitioner's terms need not be considered. Contrary to petitioner's argument that the court below "found" that UPI's terms were reasonable, nowhere did the court make such a finding. Petitioner's case failed for want of proof raising any inference supporting the existence of any trade restraint or monopoly. As petitioner concedes, even the imposition of "unreasonable terms and conditions" is unlawful only *where they are used for the purpose of destroying competition or furthering monopoly* (Pet. Cert. 14).

Petitioner can derive little solace from the fact that this case involves the public media which "are impressed with the highest degree of public interest." Nothing in *Associated Press v. United States,* 326 U.S. 1 (1945) required UPI to serve petitioner's interim newspaper on its terms and the now claimed, but unalleged and unproven,

history of "trade restraints" with respect to wire services does not affect petitioner's claim of unlawful restraints "*commencing in July of 1964.*"

Under Rule 56(c) summary judgment must be entered for the defendants in any case—antitrust or otherwise—where there is no genuine issue as to any material fact and defendants are entitled to judgment as a matter of law. *First National Bank v. Cities Service Co., supra.* As the court observed below, *Poller* and *Southern Blowpipe & Roofing Co. v. Chattanooga Gas Co.*, 360 F.2d 79 (6th Cir. 1966), admonish the use of restraint in summary procedures in "complex antitrust litigation." (Pet. Cert. 49.) But a countervailing policy is also recognized in antitrust cases—that of protecting "against the undue harassment of a litigant through a spurious lawsuit." *Waldron v. British Petroleum Co.*, 38 F.R.D. 170, 176 (S.D.N.Y. 1965), *aff'd. sub nom. Waldron v. Cities Service Co.*, 361 F.2d 671 (2d Cir. 1966), *aff'd. sub nom. First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968).[11]

The decision below is in accord with the decisions of this Court and the Writ should be denied.

II. The Decision Below Was Clearly Correct.

After exhaustive discovery,[12] petitioner's case is still founded wholly on suspicion, innuendo and unsupported,

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[11] Summary judgment, or outright dismissal, has often been granted to protect defendants from spurious private antitrust suits. *Morton Salt Co. v. G. S. Suppiger Co.*, 314 U.S. 488 (1942); *Ace Beer Distributors, Inc. v. Kohn, Inc.*, 318 F.2d 283 (6th Cir.), *cert. den.*, 375 U.S. 922 (1963), *reh. den.*, 375 U.S. 982 (1964); *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 195 F. Supp. 85 (D.N.J. 1961), *aff'd.*, 306 F.2d 61 (3d Cir. 1962), *cert. den.*, 371 U.S. 951 (1963); *Fiumara v. Texaco, Inc.*, 204 F. Supp. 544 (E.D.Pa.), *aff'd.*, 310 F.2d 737 (3d Cir. 1962), *cert. den.*, 372 U.S. 976 (1963); *Dale Hilton, Inc., v. Triangle Publications, Inc.*, 27 F.R.D. 468 (S.D.N.Y. 1961).

[12] Statement of the case, *supra* at 4-6.

implausible inferences. Petitioner's notion that UPI must have associated itself with two of its newspaper customers to deprive the interim newspaper of UPI wire services is inherently unsound. *First*, it is clear that petitioner did not offer competition, potential or actual, to the respondent newspapers, having been organized with striking employees of the newspaper respondents to "fill the void" caused by the strike, and petitioner carried on its negotiations with UPI as an interim operation only; *second*, neither newspaper respondent opposed, and one affirmatively facilitated, respondent's request for UPI's services; *third*, the record clearly shows that the rationale for UPI's refusal to accede to petitioner's terms lay in the interim nature of its business; and *finally*, it is nowhere suggested how UPI could achieve any monopolistic or anticompetitive purpose within any relevant market by *refusing* to contract with a new customer; rather than inhibit its competition, UPI in fact left the way open for such competition. No amount of rhetoric can transform UPI's unilateral business decision not to contract with petitioner on a week-to-week basis into an unlawful combination or conspiracy in restraint of trade or attempted or actual "monopolization."

A. Plaintiff Presented No Issue of Material Fact With Respect to the Alleged "Contract, Combination and Conspiracy."

Under Federal Rule 56(c), petitioner was obliged to show the existence of a *genuine* issue as to a *material* fact. It was required to present significant probative evidence to support its allegations that *beginning in July, 1964*, respondents entered into a "contract, combination or conspiracy" which consisted of an "agreement, understanding and concert of action" among the respondents where-

by UPI agreed to and did refuse to provide its news services to petitioner in violation of Sections 1 and 2 of the Sherman Act (Complaint §§ 15, 16, 17; 11a). *First National Bank v. Cities Service Co., supra,* at 290. But petitioner adduced *no* evidence in support of its charges.

Petitioner's Section 1 claim is now limited to the assertion that respondents engaged in an "unlawful combination" in restraint of trade. In support of its contention, petitioner argues that the Court of Appeals "fail[ed] to consider the full breadth of the proscription against unlawful combinations" and "[held] Plaintiff to a requirement of direct proof of conspiracy." (Pet. Cert. 17) On the contrary, the courts below found *no* evidence, direct or circumstantial, of business behavior supporting an inference of combination or concert of action in restraint of trade. As the Court of Appeals observed

> "Plaintiff did not claim there was any *direct* proof of any agreement, combination or arrangement on the part of defendants to deprive plaintiff of wire services; neither do we find any *circumstantial evidence* from which inferences could properly be drawn *even tending* to establish an agreement." (Pet. Cert. 60) (Emphasis added.)

Both courts noted the absence of any rationale drawn from the relationship of the parties or their conduct which would "connect" the respondents to UPI's business decision (Pet. Cert. 31, 33, 53-54).

Drawing its rationale from *United States v. Parke Davis & Co.*, 362 U.S. 29 (1960), this Court held in *Albrecht, supra,* that in the case of resale price maintenance, a combination in restraint of trade results if a seller suggests resale prices and secures compliance by enlisting others in taking *action* to maintain prices.

> "When respondent learned that petitioner was overcharging, it hired Milne to solicit customers away

> from petitioner in order to get petitioner to reduce his price. * * * [It] was aware that the aim of the solicitation campaign was to force petitioner to lower his price. Kroner knew that respondent was giving him the customer list as part of a program to get petitioner to conform to the advertised price. * * * He undertook to deliver papers at the suggested price and materially aided in the accomplishment of respondents plan. * * *" *Id.* at 149-50

In this case, there is no evidence, circumstantial or otherwise, of *any* action or conduct which associates any of the respondents with a trade restraint of any kind.

In substitution for such proof, petitioner urges that a combination arose to deprive it of UPI services as the result of (i) "long standing relationships," among the respondents resulting in "more favorable terms" to them (ii) knowledge on the part of the newspaper respondents of the non-availability of such favorable terms to "new" newspapers; and (iii) the "entire history of the wire service industry" which is "infected with trade restraints held *per se* unlawful * * * 25 years ago" (Pet. Cert. 16).[13] None of these bare assertions can substitute for proof of *conduct* or *agreement* linking the parties to a restraint of trade which is alleged to have commenced in July of 1964.

Instead, these contentions of "combination" suggest the proposition that even though neither newspaper respondent opposed, and one affirmatively facilitated, the 1964 negotiations between UPI and petitioner, their own claimed pre-existing knowledge of UPI's stated terms for

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[13] Petitioner also mentions, but does not discuss, its unsuccessful attempt to purchase individual photographs from UPI's separate Commercial Photo Division (Pet. Cert. 9). It is uncontroverted that this division does not sell "spot news pictures" (i.e., where time is of the essence) on an a la carte basis (319a-321a, 351a-352a; 12b; 13b).

"new" newspapers, and their acceptance of allegedly "more favorable terms" [14] years after their own publication commenced, and years before the instant case, somehow bind them to a combination with UPI to deprive petitioner of UPI services "commencing in July 1964." While it is true, as petitioner says, that "no formal agreement is necessary to constitute an unlawful conspiracy," (Pet. Cert. 16) it is also true that there must be some evidence of *conduct, concert of action* or *agreement* associating the defendants with an unlawful restraint.

The Court of Appeals adopted the District Court's characterization of the petitioner's proof as:

> "inference drawn from inference supported by facts which are themselves mere conclusions, and inferences drawn from other facts" (Pet. Cert. 60)

The courts below were correct in holding that petitioner raised no genuine issue of material fact with respect to its Section 1 allegations.

B. Petitioner Adduced No Evidence of Any Monopolization or Attempt to Monopolize by UPI Alone in Violation of Section 2 of the Sherman Act.

Petitioner has abandoned its Section 2 conspiracy charges against all of the respondents and now devotes the major portion of its argument to the claim that UPI

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[14] Petitioner's claim that UPI offered petitioner the same services as were subscribed to by the *Free Press*, but at a higher price, is incorrect (Pet. Cert. 7). A comparison of the documents compiled by petitioner for the Court of Appeals (3b, 6b and 11b) shows that the *Free Press* paid $961.78 for four services while the *News* paid $2,709.58 for eight services. The rates paid are based upon such matters as circulation, whether the customer is a morning or evening paper, Sunday edition, etc. (323a and 356a). Petitioner represented to UPI that the *Daily Press* would be an afternoon paper and, therefore, the approximate rate quoted by UPI was 6/7ths of the afternoon rate paid by the *Detroit News* because petitioner had said it would not publish a Sunday paper (307a and 356a).

unilaterally violated Section 2 by failing to provide short term services to petitioner. The gist of petitioner's claim is that UPI engaged in a "pattern of conduct" which "effectively prevented" new newspaper customers from obtaining UPI service (Pet. Cert. 13).[15] As a result it is alleged that "competition" between petitioner and the News and Free Press has been "prevented or suppressed."

As is abundantly clear from the foregoing discussion, and the record of this case, petitioner offered no competition to the Free Press or News and indeed was formed and operated exclusively to capitalize on the *absence* of competition. It was not a "new" newspaper against whom UPI's supposed "pattern of conduct" was directed. Petitioner apparently has chosen to be an *interim* paper in claiming that UPI's terms were "unreasonable" in relation to its short term needs; and a *new entrant* in order to claim to be the victim of discriminatory practices allegedly aimed at new competitors of existing customers.

As the District Court observed

> "Plaintiff cannot, in a cavalier manner, thus brush off the undisputed fact that it did not enter the publishing business to be a competitor to any existing paper but merely intended to fill the void created by the strike * * *."
>
> "Plaintiff cannot now say that it was a 'competitor' trying to be a 'viable' publishing organization * * *." (Pet. Cert. 42-43)

Petitioner's Section 2 claim is wholly without merit. UPI's failure to consummate a contract with petitioner had no effect whatever upon newspaper competition in Detroit. With respect to the news wire services market,

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[15] Petitioner's analysis suggests the dubious proposition that UPI intended to achieve monopolistic control by favoring those already in the "rapidly shrinking" newspaper market and refusing to deal with new newspapers except on "unreasonable" terms.

although petitioner does not claim that it was *in competition* with UPI, it does complain, gratuitously, of the alleged exclusionary effect of UPI's long term contracts with existing newspapers and other media. (Pet. Cert. 17).[16] UPI's failure to contract with petitioner did not enhance UPI's position or *exclude* its competitors; rather it left the way open for its competitors.

Although petitioner contends that "the issues here involved *go well beyond* the parties and incidents involved in this case," (Pet. Cert. 15) it is unable to point to any facts adduced which bring this case *within* the scope of issues raised in its argument.

Cases such as *Lorain Journal v. United States*, 342 U.S. 143 (1951) and *Kansas City Star v. United States*, 240 F.2d 643 (8th Cir.), *cert. den.*, 354 U.S. 923 (1957), and *United States v. Grinnell Corp.*, 384 U.S. 563 (1966), cited by petitioner, are wholly inapposite (Pet. Cert. 17-18). In *Lorain Journal* and *Kansas City Star* the overwhelmingly dominant newspaper, and in *Grinnell*, affiliated companies controlling 87% of the relevant market, engaged in anti-competitive conduct which was manifestly intended to and did injure or destroy competition in violation of Section 2 of the Sherman Act.[17]

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[16] Nor did petitioner offer competition to any "existing customer of UPI" (Pet. Cert. 10, 20). Indeed it profited considerably from the absence of any competition. As petitioner itself points out, the $1,800,000.00 in advertising revenue and $1,100,000.00 in circulation revenue which it earned during the strike "represented revenue forever lost to the News and Free Press" (Pet. Cert. 11).

[17] Petitioner apparently rests its claim of UPI monopoly power on the alleged importance of a "full-range" news service to daily newspapers. Petitioner's only effort to support its monopoly claim consisted of an affidavit which apparently was not filed (2a-4a) and, in any event, failed to comply with the requirements of Rule 56(e) (388a-407a). Even this inadmissible affidavit indicates that of the 1,599 daily newspapers of general circulation 50.3% are "UPI connected" while 63.8% are "AP connected."

Other cases relied upon by petitioner, *Six Twenty-Nine Productions, Inc. v. Rollins Telecasting, Inc.*, 365 F.2d 478 (5th Cir. 1966), and *Packaged Programs, Inc. v. Westinghouse Broadcasting Co.*, 255 F.2d 708 (3rd Cir. 1958) (Pet. Cert. 19), are similarly inapposite. In each of these cases the principal defendant was a television station, already enjoying a lawful broadcasting monopoly in a single station community, which sought to eliminate or restrict potential competitors by engaging in arbitrary refusals to deal.

There is no evidence supportive of petitioner's Section 2 allegations and, therefore, the Writ should be denied.

C. There Was No Abuse of the Summary Judgment Procedure.

More than a year before summary judgment was granted, District Judge Talbot Smith advised petitioner's counsel:

> "I want to know just what you have got. You may have ample or you may have nothing. And if you have something you are certainly going to be allowed to pursue it. But if you don't have anything except suspicions I am going to grant the motions for summary judgment" *Transcript* at 26.

During the following year petitioner was unable to put together any evidence in support of its complaint, and petitioner's counsel could not tell the court just how the completed discovery established an antitrust violation as counsel had said it "very definitely" had. *Transcript* at 14. In fact, petitioner's only response to the motions for summary judgment was to ask the Court of Appeals, and now this Court, for additional discovery.

Under Rule 56(b) a motion for summary judgment may be filed at any time. When such a motion has been filed, Rule 56(e) requires the plaintiff to respond and set

forth *specific facts* showing there is a genuine issue for trial. Petitioner has failed to meet this requirement of Rule 56(e) despite the fact that it has had the benefit of exhaustive discovery. Additional discovery was properly denied because the petitioner gave no "indication that it can carry its burden of proving an intention to eliminate competition. * * *" *Gold Fuel Service, Inc. v. Esso Standard Oil Co.*, 306 F.2d 61, 64 (3rd Cir. 1962), *cert. den.* 371 U.S. 951 (1963).[18] Petitioner's case remains founded solely on petitioner's suspicions, unsupported conclusions and untenable inferences.

The observation of the Second Circuit in affirming the granting of summary judgment in the *Cities Service* case, is particularly appropriate:

> "* * * Despite these more than ample opportunities to develop a basis for his action, plaintiff has been unable to do so, and has failed to demonstrate the existence of any genuine issue of fact. The court quite properly denied the Rule 56(f) motion for further discovery by which plaintiff sought to engage in still another 'fishing expedition' in the hope that he could come up with some tenable cause of action.
>
> "We are not unmindful that private antitrust suits to some extent cast the plaintiff in the role of a 'private attorney general' and that such suits are favored [citing cases] * * *. Even so, it is apparent in this case that [plaintiff] was given ample opportunity and scope in his shifting programs of discovery. The plaintiff, as a 'private attorney general' may not seek indefinitely, within the period of limitations, to use the process to find evidence in support of a mere 'hunch'

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[18] The information sought by petitioner's interrogatories to UPI (32a-42a) was irrelevant to, and would not substantiate, the charges made in the complaint. Most of petitioner's interrogatories did not even relate to the July-November 1964 time period or the Detroit market which is the subject of the complaint.

or 'suspicion' of a cause of action." *Waldron v. Cities Service Co.*, 361 F.2d 671 (2d Cir. 1966), *affd. sub nom. First National Bank v. Cities Service Co.*, 391 U.S. 253 (1968).

CONCLUSION

For the foregoing reasons the United States Court of Appeals for the Sixth Circuit correctly affirmed the grant of summary judgment by the United States District Court for the Eastern District of Michigan. No novel or important procedural or substantive questions are presented. The decision below is not in conflict with the decisions of this Court and is clearly correct. The petition for Writ of Certiorari should be denied.

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